**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR SUSSEX COUNTY**

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| STATE OF DELAWARE | : | Def. ID # 0909000858 |
| | : | |
| v. | : | Murder 1st |
| | : | CAPITAL CASE |
| DERRICK J. POWELL, | : | |
| | : | |
| Defendant. | : | |
| | : | |
| DOB:: | | |
| SBI #006 | : | |

**DECISION ON POST-TRIAL DEFENSE MOTION**

**AND SENTENCING DECISION**

**DATE: MAY 20, 2011**

Paula Ryan, Esquire, and Martin J. Cosgrove, Jr., Esquire, attorneys for the State of Delaware

Dean C. Johnson, Esquire and Stephanie A. Tsantes, Esquire, attorneys for the Defendant

GRAVES, J.

By an indictment filed on November 23, 2009, Derrick Powell ("Powell") was charged with the following crimes, all occurring on September 1, 2009:

Count 1- Murder in the First Degree - recklessly causing the death of Chad Spicer, a law enforcement officer who was in the lawful performance of his duties, by shooting him.

Count 2- Possession of a Firearm During the Commission of a Felony - possessing a firearm during the commission of Count 1.

Count 3- Murder in the First Degree - recklessly causing the death of Chad Spicer during the flight from an attempted robbery.

Count 4- Possession of a Firearm During the Commission of a Felony - possessing a firearm during the commission of Count 3.

Count 5- Burglary in the Second Degree - knowingly entering or remaining unlawfully in a dwelling while armed with a handgun.

Count 6- Possession of a Firearm During the Commission of a Felony - possessing a firearm during the commission of Count 5.

Count 7- Assault in the Second Degree - recklessly causing physical injury by means of a deadly weapon.

Count 8- Possession of a Firearm During the Commission of a Felony - possessing a firearm during the commission of Count 7.

Count 9- Resisting Arrest with Force or Violence - intentionally preventing police officers from effecting an arrest of himself by using force or violence towards two officers, by shooting at the officers with a handgun.

Count 10- Possession of a Firearm During the Commission of a Felony - possessing a firearm during the commission of Count 9.

Count 11- Attempted Robbery in the First Degree- intentionally displaying a deadly weapon, a handgun, and threatening force in order to commit theft.

Count 12- Possession of a Firearm During the Commission of a Felony - possessing a firearm during the commission of Count 11.

Count 13- Reckless Endangering in the First Degree- recklessly creating a substantial risk of death to another by shooting at that person, the victim of the attempted robbery.

Count 14- Possession of a Firearm During the Commission of a Felony- possession of a firearm during the commission of Count 13.

Following the indictment, the State of Delaware ("the State") informed Powell it would be seeking the death penalty if Powell was convicted of Murder in the First Degree.

Jury selection for the trial began on January 3, 2011. The guilt phase began on January 20, 2011. On February 8, 2011, the jury found Powell guilty of Counts 3, 4, 9, 10, 11, 12, 13 and 14 and not guilty of Counts 1, 2, 7 and 8.[1] The penalty phase began on February 14, 2011, and the jury rendered its verdict on February 23, 2011. The jury unanimously found two statutory aggravators existed and recommended, by a seven to five vote, that death be imposed.

Thereafter, the Defense filed a motion labeled, "Application of Both Due Process and The Eighth Amendment Prohibition Against Cruel and Unusual Punishment Requires a Conclusion that Delaware's Death Penalty Statute Should Not Apply To An Inconsistent Verdict Regarding This Reckless Killing". The Court's decision denying that motion is contained herein.

This opinion also contains the Court's decision as to the appropriate sentence for Powell.

## THE COURT'S FINDING OF THE FACTS

These are the Court's finding of the facts, which are consistent with the jury's verdict in the guilt phase. In reaching these findings of facts, I have had to make credibility determinations as well as the necessary weight and value decisions.

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[1]The Court entered a judgment of acquittal on Counts 5 and 6.

## SUMMARY OF THE GUILT PHASE EVIDENCE

On September 1, 2009, at 6:42 p.m., the first of several "911" calls were made, reporting shots had been fired at the McDonald's Restaurant ("McDonald's") in Georgetown, Delaware. The suspect vehicle was a silver Chrysler Sebring ("Sebring").

At 6:45 p.m., Georgetown police officers Sean Brittingham ("Brittingham") and Chad Spicer ("Spicer") reported to SUSCOM (the emergency communications system for Sussex County) that they were behind the suspect vehicle.

At 6:46 p.m., Officer Brittingham radioed to SUSCOM from his portable shoulder radio, reporting that he was chasing a suspect who had run from the suspect vehicle in the vicinity of Rosa and North King Streets, and that they (Officers Brittingham and Spicer) may have been shot at.

At 7:02 p.m., Powell was arrested at 11 Savannah Road, approximately 2 ½ blocks from Rosa Street and North King Street. Powell was carrying a black semi-automatic pistol.

The above time line is important because it establishes that the unfortunate events occurring on September 1, 2009, which ended with the shooting of Spicer, took place in just a few minutes.

Two witnesses identified Powell as the person who fired a pistol at McDonald's during an attempted robbery. The still photographs ("photos") taken from the security video at McDonald's confirm the in-court identifications by the two witnesses. (State's Exhibit 131). The still photos place Powell at the location of the attempted robbery. A shell casing found at that location was identified positively as having been fired from the pistol Powell possessed at the time of his arrest.

Officer Brittingham was correct. The police were shot at. From the driver's side rear seat of the Sebring, a shot was fired through the top rear portion of the window in the direction of the front passenger seat of the police vehicle, which was directly adjacent to the driver's side rear seat of the Sebring. The window of the front passenger seat in the police vehicle was down. The physical distance between the two vehicles was about two feet. The bullet fired from the Sebring struck Spicer. It was a fatal shot. The bullet was recovered from the police vehicle. It was fired from the same pistol found 16 minutes later in Powell's hands when he was arrested.

Therefore, what is known with certainty is that at 6:42 p.m., Powell fired a pistol in an attempted robbery at McDonald's. It also is known with certainty that Powell still possessed that pistol when arrested at 7:02 p.m. As to the murder allegations, the trial was about whether Powell was the person who shot Spicer, or whether another person in the Sebring acquired possession of the pistol and shot

Spicer, and then Powell regained possession of the pistol and fled the scene with the pistol in hand.

The jury determined, based on the evidence presented at trial, that Powell fired the shot that killed Spicer.

As in most trials, there were conflicts in the testimony, and the jury was charged with attempting to reconcile the conflicts and/or with giving credibility to that portion of the testimony worthy of credit.

The jury found Powell guilty of the charges of Attempted Robbery in the First Degree and Reckless Endangering in the First Degree, crimes which occurred at McDonald's, as well as Murder in the First Degree of Spicer (Count 3) and Resisting Arrest with Force or Violence. Additionally, Powell was convicted of Possession of a Firearm During the Commission of a Felony for each of these four felonies.

The jury found Powell not guilty of another charge of Murder in the First Degree (Count 1), the charge of Assault in the Second Degree concerning a bullet fragment that struck Sean Brittingham, and the related firearms charges.

At the conclusion of the State's case-in-chief, the Court determined that the State had not produced sufficient evidence against Powell as to the burglary and accompanying weapon offense. There was no evidence that Powell entered or remained unlawfully in the dwelling in which he was arrested, nor could this element

be reasonably inferred. On the porch, he asked the occupant for water. He asked the occupant for the use of her phone. He asked the occupant if he could use the bathroom. He received a bottle of water, used the phone and later used the bathroom. In the context of this evidence, an illegal entry reasonably could not be inferred.

## DETAILED RECITATION OF THE EVIDENCE

These details, likewise, are taken from the evidence presented during the guilt phase. Some corroborating evidence is taken from the penalty phase. Penalty phase evidence is identified.

On the night of August 31, 2009, Powell stayed at the house of his friend, Luis Flores ("Flores"). Powell possessed a 9mm semi-automatic pistol. Flores testified that he and Powell shot the gun in some woods approximately a week to a week and a half earlier. Flores also testified that he took the pistol from Powell on August 31, 2009, and hid it in the basement so his children would not find it. Powell was with Flores when the pistol was hidden. Powell retrieved the pistol from the basement the next morning before riding with Flores to Georgetown. Flores worked at the Perdue chicken processing plant ("Perdue") in Georgetown. On the way to work, Flores and Powell picked up Christopher Reeves ("Reeves"), a co-worker of Flores.

Powell, Flores and Reeves had a plan to obtain a quantity of marijuana. The plan was to rip off or rob a person. Reeves's thought was that the victim should be

a drug dealer.[2] Specifically, that person was Thomas Bundick ("Bundick"). Bundick knew Reeves, but did not know Powell or Flores.

The plan was to have Bundick sell Reeves four ounces of marijuana in exchange for $480 or $500. Instead of paying Bundick, they would rob him when they met.

Many text messages were exchanged on September 1, 2009, while Flores and Reeves were working at Perdue. Powell remained in the parking lot at Perdue polishing the Sebring's headlights, sleeping in the vehicle, and/or listening to the radio.

Flores and Reeves left Perdue at approximately 2:00 p.m., while on their lunch break. Flores, Reeves, and Powell planned to meet and rob Bundick at the Kentucky Fried Chicken Restaurant ("KFC"), also located in Georgetown. Powell had his pistol.

The plan was to get Bundick into the car and then rob him, inferentially by strong arm or by the threat of the pistol. The hope was that the dark, tinted windows of the Sebring would prevent others from witnessing the robbery.

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[2] Powell did not testify at either the trial or the penalty hearing, nor did he exercise his right of allocution. However, his psychiatrist testified at the penalty hearing that Powell told her he planned the robbery to get money to return to Maryland; i.e., "one last job".

The seating arrangement reasonably fit the plan. Reeves drove Flores's Sebring because Bundick only knew Reeves and Bundick would be able to see the driver of the Sebring. Flores sat behind the front right passenger seat. Flores was and is a big person, presumably capable of a strong-arm robbery. Powell sat on the left driver's side rear seat, behind the driver, Reeves. The front right passenger seat was left open for Bundick. Bundick, who would be sitting in the passenger side of the vehicle, clearly would be able to see Powell, and if necessary, the pistol, when he turned his head to his left.

The problem was that Bundick did not have four ounces of marijuana. He was trying to be a broker or middleman by hooking up Darshon Adkins ("Adkins") with Reeves. Bundick hoped that by being the middleman, he would acquire some marijuana or money out of the deal. Powell, Flores, and Reeves believed Bundick had the marijuana and they knew nothing of Adkins.

The lunch break deal/robbery never took place because Bundick was not able to arrange for Adkins to arrive at the meeting place by the time Flores and Reeves had to return to Perdue. The text messages continued throughout the remainder of the afternoon. Flores and Reeves kept trying to get "the deal" done when they got off work. Bundick still was trying to broker the deal by inducing Adkins to bring the marijuana.

After the lunch break, Powell had continued to stay in the car, sleeping and/or listening to the radio while Flores and Reeves worked. After finishing their work day, Flores and Reeves again met Powell in the Perdue parking lot. They drove toward KFC with the same seating arrangement as they had at the lunch break.

After more text messages, Flores, Reeves, and Powell learned that Bundick did not have the marijuana and was brokering the deal with somebody they did not know. The meeting also was moved to McDonald's.

There was much distrust. Flores, Reeves, and Powell arrived at McDonald's and parked in the back parking lot. They backed into a parking spot so that they could pull straight out. Bundick arrived in a green vehicle driven by his fiancé. A friend drove Adkins to McDonald's in a black BMW. Bundick kept trying to hook Adkins up with Reeves. Adkins would not get into the Sebring. Bundick and his fiancé sensed something was amiss and they left.

At this stage, Flores, Reeves, and Powell knew the guy with the four ounces of marijuana (Adkins) was not going to come to their car. They suspected he came in the black BMW. They saw a person exit the BMW and go into McDonald's.

Flores wanted to abandon the robbery because they could not do it as planned.

Powell told Reeves and Flores to leave and then loop back and get him. Powell got out of the Sebring and walked over to the east side of McDonald's up to

the front of the restaurant. Strangely, Powell had unprovoked words with Sammy Smith, a McDonald's employee who had just finished his shift and was "hanging out" outside with two other co-employees. In court, Mr. Smith identified Powell as the person who fired a gun and then ran and got into the driver's side rear seat of the silver Sebring that then sped off.

Adkins was standing in front of McDonald's when Powell approached him from the rear, pulled a gun, and told him to give it up. Words were exchanged for a few seconds. Other witnesses could see something was going on but the distance prohibited them from hearing what was said. Adkins then turned and ran towards the highway. He actually ran right out of his shoes. Powell fired at least one shot in Adkins's direction. Powell then ran, and the remaining witnesses testified he got into the driver's side rear seat of the Sebring. Flores testified that after the shot was fired, Reeves started to drive away without Powell. Flores told Reeves to stop because Powell was his friend. Reeves stopped and Flores opened the driver's side rear door for Powell to get into the car.

Adkins identified Powell in court, in no uncertain terms, as the person who attempted to rob him. A person of Powell's build and wearing the same type of clothes can be seen in the McDonald's security video. Powell's face can be seen in the blowup stills of the video. (State's Exhibit 131).

The location where Powell entered the vehicle is important because it is from that location that the bullet which killed Spicer was fired.[3] The bullet went through the upper rear portion of the rear window of the Sebring. This took place four (4) minutes after the first "911" call at McDonald's.

After leaving McDonald's, Flores testified he and Powell argued about the stupidity of what Powell had just done.

Reeves testified that when he drove by the school in Georgetown he wanted to stop and bail out but Powell told him to keep going.

By the time they approached The Circle, a police car was behind them with its siren and flashing lights on. Reeves did not stop. He kept going. Reeves testified that Powell said he would shoot at the cops if Reeves stopped. Reeves turned left on North King Street and the police car stayed behind them.

Reeves decided to stop, and did so abruptly. When he opened the driver's door to bail out, the police car, as it was coming to a stop, struck the opening door. The right headlight bumper area of the police car struck the opening door, causing minimal damage. The position of the stopped vehicles prevented Reeves from fully opening his door. The vehicles were just two feet apart.

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[3] At the penalty hearing, Powell's psychiatrist testified he told her he was seated in the driver's side rear seat.

Nevertheless, Reeves got out, scampered across the hood of the police car, ran north on North King Street towards Rosa Street and then west down Rosa Street. The police car dashboard video captured Reeves going across the hood of the police vehicle. His palm prints also were found on the hood of the police vehicle.

Officer Brittingham, who was driving the police car, exited his vehicle to pursue Reeves. As Officer Brittingham was leaving his vehicle, he heard what he thought was a gunshot and felt a sting on his neck. He reported this on his portable shoulder radio. Reeves also testified it was about this same time he heard the shot.

Flores testified that Powell, still sitting in the driver's side rear seat, pointed his pistol toward the police car, fired one shot, said nothing, opened the door and left through the driver's side rear door where he was sitting. Flores was the only eyewitness as to seeing Powell pull the trigger.

Although they could not see inside the Sebring because of the tinted windows, at least three Georgetown residents observed what happened immediately after the shot was fired.

Each of the residents had their attention drawn to the vehicles because of the chase, the stop, and then the driver running. Each testified that a person fitting Powell's description immediately exited the vehicle after the shot was fired. Their recollections varied as to which door he exited, but all agreed on the description

fitting Powell. Two witnesses testified he had a black pistol in his hand and that he was doing something that resembled working the slide on the gun. A third witness testified he saw something black. Again, the witnesses' testimony varied as to which door the person with the gun exited (all doors except the driver's door), but the witnesses all agreed on which direction he ran. He ran across an empty lot towards the Perdue plant. Savannah Road is directly in line with the path that the person ran. It is between the location of the shooting and the Perdue plant. Powell was arrested minutes later, with a black pistol in hand, at 11 Savannah Road. The arrest was accomplished, but with a significant struggle to handcuff Powell. [4]

The subsequent ballistic investigation positively identified the pistol found on Powell with the shell casing found at the McDonald's crime scene and with the bullet that killed Spicer.

Meanwhile, back at the police car, Flores, whom three local residents identified as "the fat guy", did not run. He stayed. Witnesses heard him say, "Oh, my God!" and yell, "Why did you do that?" or similar words. Flores and Powell were dressed in similar clothing but no doubt exists about the difference in their physical

[4]Allegations of excessive force were raised in cross-examination but were ultimately irrelevant as to the guilt phase. The resisting arrest charge did not stem from when Powell was taken into custody. It involved the events at North King and Rosa Streets.

appearances.

The witnesses saw "the fat guy" get out of the Sebring, approach the police car, and attempt to give assistance to Spicer. One witness heard "the fat guy" shouting to Spicer, "Are you ok?" The vehicles were too close together and Flores could not open Spicer's door wide enough to get to him, so he moved the Sebring up a few feet to allow the police car door to be fully opened. He attempted to help Spicer by getting him out of the vehicle. Spicer, mortally wounded, was bleeding heavily from his mouth.

Close in time, Officer Brittingham returned from unsuccessfully chasing Reeves. He also realized he had not heard his partner on the police radio. He returned to find the above. He learned that Flores had been in the Sebring and immediately handcuffed him.

Later, Flores was tested for gunshot residue. Powell also was tested for gunshot residue.

The gunshot residue expert testified to the following. He determined that Powell and Flores had gunshot residue on their hands. The gun was fired through the window in an enclosed car. Gunshot residue is easily transferred. It can be wiped off by the simple act of putting one's hands into the pocket of pants. It can be washed off.

There was testimony that Powell wrestled with the police upon arrest. He used the bathroom at 11 Savannah Road prior to the police arresting him, raising the inference that residue could have been washed and/or wiped off. There also was testimony that in assisting Spicer, Flores could have had gunshot residue transferred from Spicer to his hands.

The DNA testing of the murder weapon found DNA that statistically matched both Powell and Flores on the trigger guard and trigger. This evidence established that at some time, both Flores and Powell handled the gun.

The defense was that the scientific evidence cast a reasonable doubt on the State's case in that it pointed to Flores as the shooter because his DNA was on the gun and he had gunshot residue on his person.

Powell did not testify, as was his right.

Ultimately, the jury convicted Powell. The Court finds this jury's verdict to be based on common sense and to be correct.

## THE DEFENSE'S POST-TRIAL MOTION

The Defense argued the scientific evidence showed that Flores was or could have been the shooter. The time line, the above evidence, and common sense point solely to Powell as being the shooter. The evidence also provided an explanation for Flores's DNA being on the gun and the gun shot residue being on Flores.

The Defense questioned Flores's testimony as being self-serving. The fact that Flores was not charged with anything was exploited. Nevertheless, other independent witnesses corroborated his testimony as to both the McDonald's incident and the shooting of the officer. Reeves received a favorable plea deal. Portions of his testimony were corroborated and portions were very self-serving. The jury received the appropriate instructions as to the testimony of Flores and Reeves. The Court has applied those same instructions in considering their testimony. It is true that Flores and Reeves are two characters whose testimony should be viewed with caution. But, the Court has found their testimony to be credible because it fits the picture as to what is known from the independent witnesses and fits a common sense consideration of the evidence.

The most important evidence was that Powell had the murder weapon in his hand at the McDonald's attempted robbery, four minutes before Spicer was shot, and he had it in his hand *immediately* after the shooting when he fled from the scene. Likewise, he had it when he was arrested 16 minutes later. The uninterested witnesses had Powell exiting the Sebring immediately after the shooting with the gun in his hand.

Other important evidence concerns flight versus non-flight from the murder scene. Powell fled. He tried to arrange a ride out of town from Savannah Road. He

asked to use the phone at 11 Savannah Road and was allowed to do so. He told the occupant at 11 Savannah Road he had to get a ride out of town.[5] The jury was instructed that flight may be evidence of a consciousness of guilt. Flores did not flee. He stayed and tried to assist the wounded officer.

The Defense theory would have Powell shooting the gun at McDonald's and then within the next four minutes, Flores getting the pistol from Powell, shooting the gun at Spicer, and getting the gun back to Powell. Not having shot the officer, Powell nevertheless fled with the gun. Flores, whom the Defense argued shot Spicer, immediately went to help the policeman. The Defense's composition of the murder's commission is contrary to human nature and common sense.

A jury's job is to make sense of the evidence, and the verdict stands so long as there is evidence to support it. Ample evidence supports the verdict. The Court is satisfied, beyond a reasonable doubt, that the person who shot Spicer was Derrick Powell.

Following the verdict, the Defense argued that the death penalty should not be considered in Powell's case because:

(1) The verdict evidenced residual doubt;

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[5]In the penalty phase, a witness testified Powell had called him, stating he had shot somebody and needed him to come and give him a ride.

(2) The verdict was inconsistent; and,

(3) There was no evidence of a reckless indifference to human life.

We do not know the process by which the jury reached its verdict, and by our law we shall not make that inquiry. What we do know is that the jury asked a question as to the difference between Counts 1 and 3, which are the two murder counts. The question they posed was: "Please clarify the difference between count 1 and count 3."

The State's theory was that Powell fled from an attempted robbery, and when the police chased the Sebring, Powell avoided arrest by shooting at the police. Therefore, the State charged Powell with:

(a) intentionally resisting arrest by the police with force or violence by shooting at Spicer and Shawn Brittingham with a handgun (Count 9);

and

(b) recklessly causing the death of a law enforcement officer, Spicer, while he was performing his duties (Count 1);

and

(c) recklessly causing the death of Spicer while engaged in flight from the attempted robbery (Count 3).

The overlap of these offenses is significant and the jury's question is understandable.

In one murder count (Count 1), the State's evidence was that Spicer was killed when he was acting in his official capacity. He was trying to stop the vehicle that was fleeing from McDonald's where an attempted robbery had taken place.

In the other murder count (Count 3), the State's evidence was that Spicer was killed by the person fleeing from the attempted robbery at McDonald's.

In Count 3, Spicer is not identified as a police officer but there was no evidence other than he was a police officer. In Count 9, the charge was the defendant intentionally shot at both Spicer and Brittingham in order to resist arrest. Therefore, there was sufficient evidence for the jury to find that in intentionally resisting arrest, the police were in the midst of performing their police duties in trying to stop the vehicle. In other words, the jury had before it evidence from which it potentially could have found the defendant guilty of Count 1.

But, with the same overlapping evidence that could have resulted in two murder convictions, the jury decided there should not be two murder convictions, just one. We do not know the reasons for the jury's decision, but the verdict is not legally inconsistent. Whether the jury determined the evidence did not support a conviction beyond a reasonable doubt as to Count 1 because the policeman just was passively

sitting in his car when he was shot (i.e., not then engaged in his duties), or whether the jury determined two murder convictions for one death was too much never will be known.

No matter what was involved in that deliberation process, there can be no doubt that the jury found Powell guilty of committing the murder. One only has to look to the fact that the jury unanimously found Powell *intentionally* used force or violence against Spicer by shooting at him in order to prevent him from effecting his arrest. That verdict was clear and it was confirmed in the penalty phase when the jury unanimously and beyond a reasonable doubt determined that the murder was committed for the purpose of avoiding or preventing an arrest.

No matter what the Defense argued at trial, and now reports in the post-trial arguments, the jury unanimously and beyond a reasonable doubt determined Powell committed murder; i.e., he shot Spicer.

The jury's not guilty verdict as to the charge of Assault in the Second Degree does not establish the validity of the Defense's argument. The Defense argued to the jury that there was no "physical injury" to Officer Brittingham. The Defense argued Officer Brittingham barely knew he had an injury and the only medical treatment was Neosporin and a Band-Aid. The Defense argued that whatever occurred to Officer Brittingham did not rise to "physical injury" as defined by the Delaware Code. It is

reasonable to conclude the jury accepted this argument; thus, the jury reached a "not guilty" verdict as to this charge.

Once again, in its pending post-trial motion, the Defense attacks the possibility of the death penalty in Powell's case, arguing:

(1) There is residual doubt arising from the verdict;

(2) The verdict was inconsistent; and

(3) There was no evidence of a reckless indifference to human life by Powell.

The Defense argues that the Court should not consider the death penalty because the jury's verdict did not eliminate the possibility that Flores was the shooter.

The Defense is wrong. The verdict of the jury is that Powell is guilty of being the shooter of Spicer. The verdicts of guilty of Murder in the First Degree coupled with intentionally Resisting Arrest by shooting at the police confirm the jury found Powell was the shooter of Spicer. There was no accomplice liability theory even presented to the jury. To argue otherwise, at this stage, ignores the verdict and ignores the premise that in considering all of the evidence, the jury was within its province to find that all of the elements of the offense were proven beyond a reasonable doubt. Both direct and circumstantial evidence may be considered by the jury. It is up to the jury to make credibility decisions and determine the facts. The

jury has done so. *Torrence v. State,* 888 A.2d 232, 2005 WL 2923501, *2 (Del. Nov. 2, 2005) (TABLE).

The ground of "residual doubt" is meritless and the motion is denied as to that ground.

The Defense argues that the jury's verdict of finding the defendant guilty of one count of Murder in the First Degree but not guilty to the other count of Murder in the First Degree is inconsistent. While there was evidence for the jury potentially to have found the defendant guilty of both counts of First Degree Murder, the fact that the jury did not agree unanimously and beyond a reasonable doubt as to both counts does not make its decision inconsistent. Different elements involving the murder exist in Counts 1 and Counts 3; consequently, the verdicts cannot be legally inconsistent. *Tilden v. State*, 513 A.2d 1302, 1306 (Del. 1986).

The simple fact is that because the jury verdict was not inconsistent, jury lenity is not an issue. *See id.* But, the jury's question about the difference between Counts 1 and 3, as well as the overlapping evidence, combined with two murder counts and one victim does lead to my conclusion of a *de facto* lenity decision.

Defendant's motion based on allegedly inconsistent verdicts fails.

The Defense includes in its March 8, 2011, motion and argument that "[b]ased on the jury's verdict, a finding, at this point, that Powell was a major participant in

criminal activity is inescapable." Having said that, the Defense tries to walk away from the specific verdicts of the jury by arguing there is nothing to support that Powell's reckless conduct rose to a reckless indifference to human life. The Defense argues that this shooting was not the result of a plan to kill and the gun only went off when the cars crashed.

I appreciate the jobs of all of the attorneys and that defense counsel presently has a difficult verdict with which to contend, but the above arguments fail as to the actual evidence the jury heard. Any arguments now that this killing was an accident caused by a crash is off the mark because:

(1) That argument never was made at trial, and

(2) The evidence does not support such an inference.

Powell fired the gun after a very minor collision between the police car and the driver's side door that Reeves was opening. The photos evidence the minor collision. It was after the contact that Reeves fled, with Brittingham going after him. Then, Powell pointed the gun at Spicer and pulled the trigger. The fact that these events occurred in a very short period of time does not change their sequence. Powell came armed with a gun and to infer this was a sudden or impulsive act is contrary to the evidence. Having introduced and fired a firearm during the attempted robbery, he was well aware he had used deadly force against Adkins. The shooting at Adkins

might have been out of frustration or impulsiveness, but then to conclude the second pulling of the trigger within five minutes was an impulsive act is unreasonable. It was the act of a desperate individual who intentionally did so to avoid arrest on the attempted robbery. The fact that the statute only requires a reckless[6] causation of death does not mean that the death penalty is not applicable to Powell.

The eyewitness testimony, coupled with Powell's possession of the killing weapon four minutes prior to the Spicer shooting and immediately afterwards, lead to the inescapable conclusion that Powell was the shooter. The jury did not buy the Flores theory, nor does the Court.

The attempt by the Defense to use the holdings of *Enmund v. Florida,* 458 U.S. 782 (1982) and *Tison v. Arizona,* 481 U.S. 137 (1987), to support its position also fails. Those cases stand for the proposition that a non-triggerman co-defendant cannot

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[6]Guidance from the jury is always helpful in these cases. The Defense argued prior to trial that the charge of recklessly causing the death of another was not the conduct that constitutionally permitted the State to seek the death penalty.

The jury instructions permitted the jury to find reckless conduct if the State proved intentional conduct. 11 *Del. C.* § 253. The Court suggested an interrogatory, in the event of a guilty verdict, to inquire as to whether the jury, in making a unanimous decision that Powell was guilty of murder, found his conduct reckless or intentional pursuant to 11 *Del. C.* § 253. The Defense strongly opposed such an interrogatory. It was not given. The response to such an interrogatory would have been helpful to the Court in its sentencing decision. In any case, the jury did give the Court guidance when it found Powell *intentionally* resisted arrest by shooting at the two officers.

face the death penalty unless his conduct rose to a reckless indifference to human life and he was a major participant in the criminal conduct. To rephrase, if a co-defendant was a major participant in the criminal activity, and his or her conduct exhibited a reckless indifference to human life, then that co-defendant can face the death penalty, even if that person was not the actual killer.

In the present case, there was no evidence of, or argument made, that Powell was guilty of killing Spicer as an accomplice. No accomplice liability instructions were requested because that was not what this case was about. The major participant was Powell because it was Powell whom the jury found had shot at the police.

The only potential relevance of this argument is that the death penalty should be reserved for one whose mental status is minimally that of reckless indifference to human life. Powell had a plan to rob, and attempted to carry out that robbery, by shooting his gun at the robbery victim and thereby endangering human life. Approximately four to five minutes later, he again made the decision to pull the trigger, this time in the direction of a police officer sitting three feet away. The jury verdict was that he intentionally resisted arrest. His conduct rises to a level of reckless disregard to human life. The evidence and jury verdict in this case do not call into play the holdings of *Enmund* and *Tison.* Specifically, the Court finds that the death of Spicer was not due to a crash-related accident. It was the unfortunate result

of Powell's decision to avoid arrest by shooting Spicer. This final ground also is deemed meritless.

For the foregoing reasons, the post-verdict motion must be denied.

## PROCEDURAL AND LEGAL FRAMEWORK FOR SENTENCING DECISION

In reaching its decision on the sentence, the Court has considered the evidence presented in both the guilt phase and in the penalty phase. The Court has considered the statutory aggravators which the jury found to exist unanimously and beyond a reasonable doubt. The Court has considered the non-statutory aggravators. The Court has considered the mitigators. The Court has considered the jury's sentencing recommendation and has given it great weight. Pursuant to 11 *Del. C.* § 4209(d), the Court has weighed all of the relevant evidence in aggravation and mitigation, *which bears on the particular circumstances or details of the commission of the offenses and the character and propensities of Powell*, to determine if the aggravating circumstances outweigh the mitigating circumstances. If the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances outweigh the mitigating circumstances, then the sentence

shall be death. 11 *Del. C.* § 4209(d)(1). Otherwise, the penalty shall be life imprisonment without the benefit of parole, probation, or other reduction. 11 *Del. C.* § 4209(d)(2).

In performing this analysis, it is important to take note of the layered approach our law requires in the consideration of the death penalty as a potential sentence. This filtering process is designed to comply strictly with the appropriate due process necessary when the State seeks the imposition of the death penalty for a conviction of murder in the first degree.

At the beginning of the jury selection for a first degree murder trial, the jury pool immediately is made aware of the potential that the State will seek the death penalty if the defendant is convicted of first degree murder. At the conclusion of the guilt phase of the trial, the jury unanimously must find the defendant guilty of murder in the first degree beyond a reasonable doubt in order to proceed to a penalty hearing.

At the penalty hearing, it is necessary for the jury to agree unanimously and beyond a reasonable doubt as to the existence of at least one statutory aggravating circumstance before the defendant can be death-penalty eligible. 11 *Del. C.* § 4209( c) and (e).

The next step requires the jury to weigh the relevant evidence in aggravation and mitigation. Each juror then individually votes as to whether, by a preponderance

of the evidence, the aggravating circumstances outweigh the mitigating circumstances. This is known as the jury recommendation to the Court. 11 *Del. C.* § 4209 (c)(3)b.2.

The decision then falls upon the judge to independently weigh the evidence, the aggravators, the mitigators and the jury's recommendation and to make the final sentencing decision. Ultimately, a Superior Court judge must make the hard and difficult decision of whether the death penalty should be imposed or whether the defendant should serve a life sentence.

The Court has attempted to make this decision fairly, impartially, and objectively, based upon the law and the evidence. This case has impacted, irreversibly, the families of both Powell and Officer Chad Spicer. The sentence to be imposed will impact, irreversibly, both those families. However, the Court must make the sentencing decision without allowing sympathy to interfere.

It is noted that there is a significant overlap in the numerous aggravators and mitigators the State and the Defense have listed. Some of this evidence is akin to a two- edged sword. Some of the State's aggravating evidence also supported mitigating circumstances, and some of the Defense's mitigating evidence supported aggravating circumstances. The Court's review and analysis has considered all of the relevant evidence regardless of which side presented the evidence.

## THE PENALTY PHASE
## 11 *Del. C.* § 4209(b)

The penalty hearing began on February 14, 2011. As is always the case in penalty hearings, both the State and Defense were given liberal opportunity to present their evidence, theories, and argument. There was re–redirect and re-recross until all their respective questions were answered. Considering all of the evidence presented, regardless of who may have presented it, the jury reached a verdict and recommendation on February 23, 2011.

The State alleged two statutory aggravating circumstances pursuant to 11 *Del. C.* § 4209(e). They were:

> (1) The murder was committed while the defendant was engaged in the commission of, or attempting to commit, or flight after committing or attempting to commit robbery. 11 *Del. C.* § 4209(e)(1)j.
>
> (2) The murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody. 11 *Del. C.* § 4209(e)(1)b.

Because the jury found the defendant guilty of Count 3's felony murder, which mirrored the statutory aggravator, the jury was informed that it must answer yes as to

whether the State had proven this aggravator unanimously and beyond a reasonable doubt.

The jury unanimously found the second statutory aggravator had been proven beyond a reasonable doubt.

I agree with the jury's findings that both statutory aggravating circumstances have been proven beyond a reasonable doubt.

The jury's findings that these two statutory aggravating circumstances existed made the defendant death-penalty eligible pursuant to 11 *Del. C.* § 4209(b).

Then, the jury was tasked with the responsibility of submitting a recommendation to the Court as to whether the death penalty should be imposed or whether life imprisonment should be imposed. The individual jurors were to make that recommendation, and that recommendation need not be a unanimous one.

The jury's job encompassed considering all the relevant evidence in aggravation or mitigation, which bear upon the particular circumstances and details of the commission of the offense, and the character and propensities of the offender. The jury then was to determine whether, by a preponderance of the evidence, the aggravating circumstances found to exist outweighed the mitigating circumstances found to exist. 11 *Del. C.* § 4209 (c)(3). If so, that would be a recommendation of death. If not, that would be a recommendation of life imprisonment.

The jury voted seven in the affirmative and five in the negative. Thus, the jury recommended the death penalty by a seven-to-five vote. The jury's recommendation is not binding upon the Court but is given great weight. 11 *Del. C.* § 4209(d).

Now, the Court is tasked with the responsibility of making the final determination of the sentence pursuant to 11 *Del. C.* § 4209(d). The Court also must consider "the particular circumstances or details of the commission of the offense and the character and propensities of the offender", and whether the aggravating circumstances the Court finds to exist outweigh the mitigating circumstances it finds to exist.

All first degree murders are senseless crimes. The "whys" linger on and on, not only for the families involved, but for society, also.

This murder was particularly senseless. The defendant chose to commit the intentional crime of robbery in the first degree by using a loaded firearm. He planned the robbery with others, and when it did not go as planned, he did not abort the robbery but took matters into his own hands. He sought out his victim in broad daylight at a restaurant frequented by families and persons of all ages. At that restaurant, he fired his 9mm semi-automatic pistol at the victim when the victim stupidly chose not to give up his marijuana. The jury found Powell recklessly endangered the victim's life. By firing the firearm at the front of McDonald's, Powell

also endangered many other innocent people.

Whether the defendant acted intentionally or recklessly in shooting at Darshon Adkins is unknown. Only Powell knows whether he shot at Darshon Adkins in an attempt to accomplish the robbery or out of frustration from a failed attempt to accomplish the robbery. However, the answers to those questions are irrelevant. What is relevant is what occurred thereafter.

The Court is satisfied that following the McDonald's shooting, there was a heated discussion within the Sebring as to what Powell just had done. Not much time passed from when the police pursuit began to the time of the shooting of the police officer, but it was enough time for anyone to make the decision just to give up. Powell chose not to give up. He chose to point his gun and pull the trigger for the second time within approximately four to five minutes.

The conviction of the defendant for felony murder while fleeing the attempted robbery automatically establishes the similar statutory aggravator. This aggravator has been established, but is not weighted heavily because it is the same conduct supporting the crime of which the defendant stands convicted.

The jury's verdict unanimously finding that the murder was committed for the purpose of avoiding or preventing Powell's arrest coupled with the jury's verdict in the guilt phase that Powell *intentionally* resisted arrest by force or violence "by

shooting at the officers with a handgun" clearly establish that it was the defendant's conscious object or purpose to get away by firing his handgun at the police. The Court weighted this second aggravator heavily.

It would appear that the Georgetown police officers were expecting no more problems than occur during the usual police chase. After a police chase, the driver frequently runs away. Reeves did just that, and Officer Brittingham pursued him.

It is unknown as to whether Officer Spicer even perceived he was in a life-threatening or dangerous circumstance. Tinted windows allow passengers to see out of a vehicle but make it very difficult to see in the vehicle. Whether Officer Spicer was aware two other people were in the back seat of the Sebring is unknown. Other than being a police officer, Officer Spicer presented no threat to Powell. With his window down, Spicer clearly was visible to Powell. Powell made the decision to point his firearm at the officer and fire it through the window of the Sebring into the police vehicle which was just two feet away. From the Sebring window to the face of Spicer, the distance was no more than three feet. This evidence is clear proof of Powell's state of mind.

Reeves's testimony that Powell stated, during the chase, that if Reeves stopped, Powell would shoot the cops is corroborating proof of Powell's state of mind.

Whether Powell actually formed an intent to kill the police officer is an unknown. The finder of facts may make inferences as to a defendant's state of mind by considering the acts the defendant was found to have done. Pointing and firing a firearm at a human being three feet away gives rise to a strong inference. This was no accident. Powell intended to shoot at the police in order to get away.

These "particular circumstances or details of the commission of the offenses" weigh heavily in aggravation.

## OTHER ADJUDICATED OFFENSES

Powell was found guilty of Attempted Robbery in the First Degree by pointing a handgun at the victim and endangering the robbery victim's life by shooting at him. These are serious offenses that are considered as serious aggravators.

The defendant's four convictions of Possession of a Firearm During the Commission of a Felony are not weighed as additional aggravators because the use of the firearm was considered in the primary offenses discussed above.

## THE NON-STATUTORY AGGRAVATORS

The State's list of non-statutory aggravators included the following:

1. The impact of Spicer's murder on his relatives and/or friends.
2. The impact of Spicer's murder on his co-workers, including Shawn Brittingham and the Georgetown Police Department.

3. While resisting arrest, the defendant fired a handgun at an occupied police vehicle, while fleeing from an attempted robbery involving that same handgun, killing Spicer.

4. The defendant's prior criminal history and lack of rehabilitation following periods of incarceration and probation in Maryland, including juvenile probation and supervision.

5. The defendant's absconding from probation in Maryland.

6. The defendant's wanted status in Maryland at the time of the murder for felony charges involving use/possession of a firearm, and the underlying circumstances of those charges.

7. The defendant's uncharged criminal conduct in Delaware in the months preceding the murder of Spicer.

8. The defendant's drug history and involvement, prior to and including, September 1, 2009.

9. The defendant's association with, possession of, and/or use of, a firearm prior to and including September 1, 2009, both generally and in connection with robberies and drug-related robberies.

10. The defendant's lifelong history of disrespect and contempt for persons in positions of authority, including, but not limited to, teachers, school officials,

parents/guardians, employers/supervisors and law enforcement.

11. The defendant's diagnosis of Antisocial Personality Disorder.

**DEFENDANT'S ALLEGED MITIGATORS**

The Defense advanced the following list of alleged mitigators:

1. The absence of a conviction as an adult for any prior crime of violence.
2. The defendant's youthful age at the time of the crime – just 22 years old.
3. His dysfunctional family background.
4. Chronic physical and emotional abuse.
5. Lack of appropriate role models or parental guidance.
6. The failure of multiple Maryland agencies to properly diagnose and protect him as a child.
7. The defendant's substantial impairment at the time of the offense as a result of brain damage.
8. The defendant's diagnosis of Cognitive Disorder, NOS, Severe w/Global Deterioration and Further Differential Deficits in Reading, Writing, Attention, Inhibition, Some Executive Skills (Planning) and Fine-Motor Skills.
9. The defendant's previously diagnosed and untreated major mental illnesses, including Bi-Polar Disorder, Posttraumatic Stress Disorder and Panic Disorder.
10. The defendant's diagnosis of Attention Deficit Hyperactive Disorder.

11. The defendant suffers from substance abuse issues without the benefit of treatment.

12. The defendant's conditions of incarceration are extremely harsh.

13. The suffering of his family and siblings if he is executed.

14. The lack of future dangerousness to the community if he is incarcerated for life without the possibility of parole, probation, or any form of early release.

## DISCUSSION OF NON-STATUTORY AGGRAVATORS AND DEFENSE MITIGATORS

The State presented victim and community impact testimony from Ruth Ann Spicer, Officer Shawn Brittingham, and Chief William Topping.

Mrs. Spicer testified as to the very strong bond between her son and his entire family. Chad Spicer was raising his daughter, Aubrey, as a single parent with much support from Mrs. Spicer. Mr. and Mrs. Spicer became the custodians of Aubrey immediately after her father's death.

The testimony can best be summed up as follows: Chad Spicer enjoyed being in a loving and close-knit family. The care of his daughter was his number one priority, with family being his second priority. The loss of son and father is remembered everyday.

Officer Brittingham and Chief Topping testified to Chad Spicer's dedication

to community service by being a police officer in his home town. His death has impacted the entire town of Georgetown.

These non-statutory aggravating factors, i.e., the impacts on relatives, friends, community and the Georgetown Police Department, have been established.

Powell's Maryland probation officer's testimony included a review of the poor performance of Powell while on probation as an adult in Maryland. Powell was on probation for a drug offense (cocaine). Powell did not care about obtaining substance abuse treatment. He enjoyed his marijuana and basically commented that he would continue to use it as it was therapeutic for him; i.e., it kept him from punching people. Powell did not hold down a job and frequently missed appointments. Powell was on absconder-status at the time of the shooting in Georgetown. The probation officer reviewed a document Powell signed wherein he acknowledged he knew he was not to possess or be around firearms. These non-statutory aggravating circumstances have been established.

John Blunt ("Blunt") and Michael Miller ("Miller") testified to a scary incident which took place in Maryland. They were students at Frostburg University. One evening, Powell and three other people came into Blunt and Miller's apartment and stole property from Miller. One person in Powell's group made a claim that Miller damaged his vehicle and they were going to take his property. Of importance is that

both students testified that Powell was armed with a firearm; i.e., a semi-automatic pistol. Powell held it pointed at Miller while the others ransacked Miller's room. Powell threatened to kill Miller. Powell threatened Blunt and told Blunt and Miller he would come back and kill them if the police were called. Immediately after Powell and his cohorts left, the police were called and a warrant was issued for Powell. The charges included burglary, assault, and a weapons offense. Those charges arose while Powell was on probation and after he had signed his "no firearms" paperwork. This non-statutory aggravator has been proven.[7]

Michael Vanderhoeven ("Vanderhoeven"), a convicted felon, testified that he knew Powell and that they committed crimes together. The crimes involved forging payroll checks and cashing them. Vanderhoeven testified that Powell took most of the money. Vanderhoeven testified that, when tan, he looks similar to Powell. At the direction of Powell, Vanderhoeven used Powell's license to pass forged checks written in Powell's name. When Vanderhoeven was arrested trying to pass a check, the Milford Police found Powell's license on Vanderhoeven. Vanderhoeven testified that from the time he met Powell in May 2009 through August 2009, Powell went

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[7]Prior to the jury hearing this testimony, the Court conducted a hearing and determined the evidence met the clear and convincing standard established in *State v. Cohen*, 1992 WL 131773, *4 (Del. Super. April 21, 1992). The same screening was done on the subsequent uncharged criminal evidence.

from being "an okay guy" to being scary and explosive. Twice when Vanderhoeven became reluctant to continue passing the forged checks, Powell threatened him with a gun to the temple and a gun barrel in the mouth. Vanderhoeven said Powell had two pistols that summer. One was a revolver and one was a semi-automatic.

Vanderhoeven also testified that before attempts to pass the check, Powell directed Vanderhoeven to get the money and informed Vanderhoeven that "if [the] cops come around, he would take care of [the] situation."

Katherine Phillips ("Phillips"), a friend of Powell, testified. She denied any involvement in the check fraud scheme and basically put it all on Vanderhoeven. She denied any involvement by Powell in the scheme or any misconduct by Powell towards her. The Court does not find Phillips to be a credible witness based on her "explanation" of why she ran, resisted arrest, and was tasered on the day Vanderhoeven and she were arrested while trying to pass a check in Milford.

The Court is satisfied that clear and convincing evidence established this uncharged criminal conduct (passing forged checks and the gun threats towards Vanderhoeven). This non-statutory aggravator has been established.

The Court was not satisfied that Vanderhoeven's mother's testimony met the clear and convincing test as to threats by Powell towards her son. Powell allegedly made these threats in a phone conversation with her. The jury did not hear this

conversation and the Court has not considered her testimony.

Vanderhoeven also testified to matters involving the shooting of Spicer. Vanderhoeven testified that on September 1, 2009, Powell called him while he was working in Seaford. Powell told Vanderhoeven he had shot somebody and needed a ride out of Georgetown. He further testified that almost immediately afterwards, Phillips called Vanderhoeven, saying they had to go and get Powell out of Georgetown. Vanderhoeven testified he finished his break and went back to work. Phillips testified after Vanderhoeven, and she was not questioned about this telephone conversation.

The Court has not used the testimony in the preceding paragraph as an aggravator, but it considers it one more piece of evidence establishing that the jury's guilt phase verdict was correct. During the guilt phase of the trial, evidence was presented that Powell was making calls trying to obtain a ride out of Georgetown prior to his arrest at 11 Savannah Road. In trying to attain help from Vanderhoeven, Powell told him why he needed to get out of town; i.e., he just had shot somebody.

Tykwan James ("James") testified to another explosive and violent incident concerning Powell. James testified as to his own background, and he is no saint. James lived at his girlfriend's house in Harrington, Delaware. Flores arranged for Powell to stay there because Powell was wanted in Maryland. James testified Powell

pretty much stayed to himself. On the day before the shooting in Georgetown, James communicated a message from his girlfriend's mother to Powell, asking him to clean up his dirty dishes. Powell pulled a long knife, stood and stared down James, and then chased him out of the house. Flores's trial testimony corroborated this episode in that he said he had to retrieve Powell from where he was staying in Harrington as Powell could not stay there any more because of an incident. That is why Powell stayed with Flores the night before the Georgetown shooting. This non-statutory aggravator has been proven.

The evidence established that, prior to shooting Spicer, Powell threatened three people with a gun and threatened or menaced one person with a knife. On September 1, 2009, Powell threatened and shot at the attempted robbery victim. Additionally, these incidents are further examples of the recognition by the Defense and the State's doctors as to Powell's antisocial personality, which is discussed later in this decision.

Kim Bryant worked with the defense team and was assigned the task of gathering any and all records available as to Powell. She was able to locate everything but his birth records. Through Mrs. Bryant, Powell's social records were introduced, which included his education records, child protection records, social services records, custody placement records, and juvenile records. These records

evidenced that Powell unfortunately was raised in an abusive, drug-using, dysfunctional environment. The witnesses for the Defense confirmed those records were correct. These mitigators have been proven.

Tina Durham ("Durham") is Powell's mother. She testified to a tumultuous dysfunctional family, including drug consumption and physical violence within the family. She testified that she and Powell's father argued, fought, and assaulted each other. Drugs commonly were used. It seems there was a whole lot of hitting and slapping going on in all directions involving Powell, his mother and his father. There was physical and emotional abuse, but much of her testimony cuts both ways, as it established that from a young age, Powell was confrontational and a significant part of the family problems.

Durham stated Powell was a very intelligent child but was out of control and aggressive from early childhood. Powell always pushed the boundaries as to with what he could get away. Powell was disrespectful to everyone - adults, other children, police, and teachers. The crisis team would have to remove him from class at school because he was aggressive and would trash classrooms.

Durham testified that Powell would "explode". Consequently, when she would see it coming she would try to defuse him, but not by putting her hands on him because he would lash out.

Durham testified to an incident when Powell was about eight years old. While forcing him to take a bath, he bit her finger and would not release it. She finally had to bite him on the arm to get him to release her finger. He was bruised. She still has the scar. This incident resulted in Powell moving in with his father and abuse charges being filed against Durham.

Durham testified that Powell's father was reluctant to give Powell his medications for Attention Deficit Hyperactive Disorder. Nor did his father fully cooperate with the social services people who wanted additional testing and treatment for Powell.

At age twelve, Powell was back to staying more with his mother but still had constant problems with the police. The police regularly were involved with Powell as to disputes, thefts, and fights with other people.

Powell gave up on school at age fifteen. The testimony established that Powell's behavior, conduct, aggressiveness, foul language, and disrespect resulted in him being kicked out of every grade, including kindergarten. Powell was moved around to different schools in Allegany County, Maryland, and was kicked out of every school in that county.

There were efforts by the schools, social services, child protective services, and counselors to address Powell's aggressive conduct, but to no avail. Behavior

modification programs would work for a while, but then he would go back to just being bad.

The dysfunctional family background and the lack of appropriate guidance and role models are all mitigators. The physical and verbal abuse of Powell are mitigators.

Powell's age was established to be twenty-two years old as of September 1, 2009. The Defense alleged his youthful age as a mitigator. Twenty-two may be young, but society expects a person the age of twenty-two to behave like an adult. Powell's youth is more of a mitigator that points towards life imprisonment because it would be a long period of incarceration under which the Defense believes to be harsh conditions. Also, if Powell remains in his present housing where he mostly is isolated from others, this also would be a mitigator pointing toward a life sentence because it would be a long sentence under tough circumstances.

Naketa Durham is Powell's sister. She testified to lots of family fights, both verbal and physical. Currently, Powell encourages her to do well in school and stay out of trouble. This is evidence of the mitigators of family dysfunction as well as Powell's family's suffering if he is executed.

Powell's father, Joe Powell ("Joe"), corroborated most of the family's dysfunctional conduct. Each parent has their own viewpoint as to the root causes of

their problems, ranging from tempers to drug abuse to infidelity to "you name it". Powell's father and mother separated when he was young.

As to his son, Joe testified that there were incidents when it took numerous adults to hold Powell down or keep him under control, both at school and other places. Joe said all of his vacation days (25) were spent going to school when he received calls about Powell's misconduct.

Joe stated that other than spanking, the only real physical violence occurred when Powell was about two weeks shy of his eighteenth birthday. Joe and Powell had a physical fist fight and Joe struck his son in the face. There was other evidence as to this incident establishing that Powell took a swing at his father, who then knocked Powell out. This is the only incident in the records of a strike to Powell's head and loss of consciousness.

Powell's parents described him as a rebellious and explosive child. Furniture was thrown at home and at school. A television was thrown through a window. Holes were knocked in walls. Anything would set him off and sometimes, nothing would set him off. One minute he would be eating a bowl of ice cream and the next minute he would be throwing the bowl.

Powell's paternal grandmother was his safe haven. She essentially let him have his way, but even his elderly grandmother once had to punch him because of his

aggressive misconduct towards others. His maternal grandmother also found it necessary to slap him.

Joe testified that while his son lived with him and was going to school, he would give him Ritalin in the morning and the school would give him Ritalin during the day. Yet, Powell still was a discipline problem.

Joe regrets that he was not as supportive as he could have been in seeking help for Powell's behavioral problems.

Joe's testimony is corroboration of the mitigators concerning the dysfunctional family life, poor role models, and the suffering of Powell's family if he is executed.

Finally, Joe reported he made Powell leave his house when Powell was approximately eighteen years of age because his drug involvement and violent lifestyle created an unsafe environment for Joe's daughters. This is more an aggravator than a mitigator.

Clara Powell, Powell's stepmother, is only about eight years older than Powell. There is a significant age difference between Joe and Clara. She said her relationship with Powell started off well. Powell was polite and well-mannered. Family and friends warned her about Powell's misconduct but she thought he was "okay." Unfortunately, the first time Joe was gone for a weekend everything she had been warned about occurred, e.g., aggressive misconduct with furniture being tossed.

She testified Powell was disrespectful to her and Joe. Powell was violent and broke furniture.

Joe would not let Powell stay with them when Powell dropped out of school because of his "lifestyle". Joe did not want the drug lifestyle brought into the house where there were young children.

In July and/or August 2009, Clara Powell was in telephone contact with Powell, urging him to come back to Maryland and turn himself in. She said he told her he was going to come back.

Much of this testimony cuts both ways. While it may establish the family's grief if Powell is executed, it also shows that Powell easily could turn aggressively and explosively violent toward those who loved him, were kind to him, and cared for him.

Jessica Durham, Powell's half-sister, also testified on his behalf. Her brief testimony is proof of the mitigators of family support and the suffering she and the family would go through if he was executed.

Roberta Mills met Powell when her daughter introduced him to her. She had a good impression of him. Powell was well-mannered and polite. She thinks he is a good person. While he has been incarcerated, she has sent him books and has

corresponded with him. Her testimony shows that Powell will have support from friends if he receives a life sentence.

David Smith ("Smith") is a long-time friend of Powell. He knew of Powell's rough family life and Powell's drug involvement. They both grew up under tough circumstances. Smith has gone on to get married and hold down a job.

When Powell could not live with either of his parents, Smith welcomed Powell to stay with him. Smith testified that the photo of Powell, taken on the day Powell was released from incarceration in Maryland in December 2008, was at Smith's house. Smith stated the guns in the photo were his guns, not Powell's. Smith's testimony corroborates that Powell grew up in a dysfunctional family.

## MENTAL HEALTH AND BRAIN DISORDERS

Much of the penalty phase testimony came from psychiatrists, neuro-psychologists, and a brain study researcher at the University of Pennsylvania. Defense and State witnesses disagreed as to their diagnoses and/or the degree of any diagnosed disorders.

The experts did agree on one important thing. Neither his mental health issues nor cognitive disorders played any significant role in Powell's conduct on September 1, 2009, when he planned and attempted a robbery, fled, and then shot a police

officer. Perhaps the agreement of the experts as to Powell's antisocial personality best reflects his actions on September 1, 2009.

**Dr. Sadiaa Alizai-Cowen's Testimony**

Dr. Alizai-Cowen was the Defense psychiatrist. She interviewed Powell twice, reviewed a lengthy paper trail of background records, reviewed the reports from the other two defense witnesses, and rendered an opinion as to Powell's mental heath. Her review of the paper trail included school records, medical records, social services records, juvenile probation records, adult probation records, and a vast collection of the records involving the investigation of this case.

Dr. Alizai-Cowen diagnosed Powell as follows:

(1) Attention Deficit Hyperactivity Disorder ("ADHD")

(2) Bipolar II Disorder - depressive/mania with a toned-down mania

(3) Panic Disorder - anxiety

(4) Posttraumatic Stress Disorder ("PTSD")

(5) Cognitive Disorder NOS (not otherwise specified)

(6) Cannabis Abuse Disorder

(7) Antisocial Personality Disorder

In her analysis of the data upon which she relied, Dr. Alizai-Cowen acknowledged that much of it came from her interview with Powell and his "self

reports". She acknowledged his communications with her contained reports of matters that were untrue or grossly exaggerated. She used her professional judgment to separate the wheat from the chaff.

Dr. Alizai-Cowen acknowledged that Powell's self-reporting was the sole basis of her diagnosis of Anxiety Disorder, PTSD, Cannabis Abuse Disorder and Bipolar II Disorder.

Powell informed Dr. Alizai-Cowen that he never had a consistent job. In the beginning of his involvement with drugs, he was a dealer. Then, he would pretend to sell drugs, but in turn just take the person's money. This is the same pattern of conduct which he followed during the McDonald's attempted robbery. Powell advised her the McDonald's robbery was planned so he could get money to go back to Maryland. Powell told her he was in the driver's side rear seat of the Sebring.

She is of the opinion that the diagnosis of Posttraumatic Stress Disorder arose as a result of Powell's arrest. She thinks that, for Powell, it was a stressful event that causes flashbacks and anxiety no matter whether Powell resisted arrest and physical force was necessary, or whether the police overreacted in forcefully taking him into custody.

Of the disorders in existence prior to September 1, 2009, she provided the following testimony.

Her diagnosis of ADHD did not affect his behavior on September 1, 2009. "There is no clear course and no clear effect of the ADHD that I can make out at the time of the offense."

Her diagnosis of Bipolar II did not affect his behavior on September 1, 2009. "I don't believe that he was manic or depressed at the time of the offense."

Her diagnosis of Panic Disorder (anxiety) did not affect his behavior on September 1, 2009. "He did not indicate that he was having a panic attack at the time of the offense."

Her diagnosis of Cannabis Abuse Disorder did not affect his behavior on September 1, 2009. "I believe he said he last smoked the day before the offense. So, again, the diagnosis still stands, but he was not intoxicated with cannabis at the time."

She concluded Powell's life-long behavior patterns evidence an Antisocial Personality Disorder. To reach this conclusion, she examined his various diagnoses over his lifetime.

She determined that he was diagnosed as a child, at age ten, with Oppositional Defiance Disorder, which involves how a person interacts with other people. Rules and people in authority are defied.

At age six, Powell was diagnosed with Conduct Disorder, which is how he views the world. This diagnosis, to a degree, overlaps with the Oppositional Defiance

Disorder diagnosis made later in his life, in that the behaviors of both diagnoses include trouble with authority and "acting out". Dr. Alizai-Cowen testified the specific behaviors for which to look in Conduct Disorder are law-breaking, abuse towards animals and towards other people, not conforming to the rules, and not conforming to social expectations. Powell's behavior fell into all of the above categories. There were multiple episodes of his abusing animals. The records are full of Powell not doing what his teachers asked. There was an abundance of evidence that Powell was defiant and destructive at home and school. Threatening violence against teachers and fellow students, inflicting violence on others, having to have classrooms cleared as he tossed furniture, and his repeated involvement with the police and crisis managers were constants in Powell's life. As his mother said, nobody tells Powell what to do or puts their hands on him without a reaction.

Dr. Alizai-Cowen testified there is no treatment for one diagnosed with Antisocial Personality Disorder other than "structure and group activity where people are sort of 'called out' for their behavior." A life sentence in prison would provide the structure.

Antisocial Personality Disorder is not so much a "disorder" as it is the label or diagnosis of a person's personality that is antisocial. That person is defiant, law-

breaking, disrespectful of authority, over reactive, and violent; and when the aforementioned conduct occurs, there is no remorse.[8]

The diagnosis of Powell for Antisocial Personality Disorder is appropriate based on his life-long history of disrespect to parents, teachers and police, and physical violence towards people and animals. His behavior on September 1, 2009, fits the pattern.

Dr. Alizai-Cowen made a diagnosis of Cognitive Disorder NOS. "NOS" means "not otherwise specified". It is sort of a "catch-all" type of category where, if one does not have very specific descriptions of what is happening or why, this is the category one can use. (Transcript DD-17).

She testified that a Cognitive Disorder means that there was some sort of decline in his cognitive function from a previous level. (Transcript DD-17). Cognitive functions involve how one plans, organizes and processes information.

She opined that Powell's declining IQ scores led her to this diagnosis. She did not know what caused the disorder.

She did not relate this diagnosis of Cognitive Disorder to any of his conduct on September 1, 2009. (Transcript PP-E 108).

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[8]The State's psychiatrist testified as to "no remorse" for misconduct, but that was focused on the general behavior and history of Powell's antisocial personality conduct and specifically did not focus on the events of September 1, 2009.

## Dr. Sidney Binks's Testimony

Dr. Binks's speciality is forensic neuropsychology. Neuropsychology involves the study of what parts of the brain are involved in thinking skills and behavior.

He likewise reviewed the background data. In April 2010, he visited Powell at the prison and conducted a full day's battery of different tests. The testing lasted six hours. There was also an interview with Powell.

He also found portions of Powell's self-reports to be unbelievable and/or exaggerated. He made his own professional, subjective determinations as to upon what information he should rely. He also had the benefit of the report of Dr. Gur's MRI [9] study.

It was Dr. Binks's opinion that Powell had a Cognitive Disorder with severe global deterioration. He believed this was caused by a lack of oxygen at birth (or *in utero*) and/or by brain traumas occurring when Powell was growing up; i.e., severe hits to the head, resulting in a loss of consciousness or concussions.

Dr. Binks's opinion primarily is based on Powell's declining IQ scores from age six to age twenty-three, when he tested Powell in prison.

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[9]MRI is an acronym for "Magnetic Resonance Imager".

Powell's IQ test scores declined as follows:

| | |
|---|---|
| Age six | 124 |
| Age ten | 113 |
| Age thirteen | 105 |
| Age twenty-three | 87 |

Dr. Binks relied on Dr. Ruben Gur's MRI study as further evidence of a cognitive brain disorder in that the studies show large ventricles in Powell's frontal lobe. Ventricles are the portions of the brain in which fluid displaces the areas of the brain where cells have died off. Large ventricles are evidence of brain damage potentially affecting cognitive function.

This Cognitive Disorder results in diminished executive skills. Diminished executive skills translate into impairment in abstract thinking, planning, and choosing the best course of action. Dr. Binks opined that Powell would have difficulty juggling different planning functions. He did not relate this disorder to anything occurring on September 1, 2009, other than Powell's impulsiveness. (Transcript PP-E108).

Finally, on direct examination, Dr. Binks opined that prison would meet Powell's current needs involving structure for his impulsiveness and hyperactivity.

On cross-examination, Dr. Binks acknowledged there are no birth records to corroborate a low- or deprived-oxygen theory. Nor are there any records in the long paper trail of events that evidence a loss of consciousness, or brain injury, or concussion, other than the fist fight between Powell and his father when Powell was almost eighteen years old.

Dr. Binks did not think the chronic use of marijuana or other drugs were a significant cause of the decline in IQ scores. Nor did Dr. Binks believe the medications which Powell was taking at the time of the six hours of testing would have impacted the test results.

**Testimony of Ruben Gur, Ph.D.**

Dr. Gur is a professor at the University of Pennsylvania. He is also a neuropsychologist. He is conducting research in brain evaluations based on neural imaging. He studies neuro-imaging and behavior by testing for abnormalities in the brain. He teaches, but most of his time is spent researching. He directs research at the University of Pennsylvania's brain behavioral laboratory.

Dr. Gur did not receive Powell's history and he did not interview Powell.

Dr. Gur's team drills into the raw data produced by computers during a CAT[10] Scan, MRI, and PET[11]scan. Dr. Gur then applies to this data a statistical algorithm that his team developed in an attempt to analyze the empirical data. He also used Dr. Binks's professional opinion and test results in an effort to determine if cognitive deficits existed. He found such deficits in Powell's front temporal lobes. He testified his finding of large ventricles supported his conclusions.

The bottom line of his opinion is that Powell has a smaller than average portion of his brain (amygdala) which evaluates danger. He testified that the amygdala is a primitive part of the brain we share with reptiles that tells us whether whatever is happening is a threat. Thus, Powell had diminished capability to evaluate threats. This would result in greater difficulty for Powell to determine whether someone is threatening him or being nice to him.

All of this has an impact on Powell's ability to make threat assessments, fear determinations, and "fight or flight" decisions.

He did not offer an opinion on how or whether his findings had anything to do with Powell's conduct on September 1, 2009.

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[10]CAT is an acronym for "Computerized Axial Tomography".

[11]PET is an acronym for "Positron Emission Tomography".

## Dr. Thomas Swirsky-Sacchetti's Testimony

Dr. Swirsky-Sacchetti also is a neuropsychologist. He testified for the State. He had numerous concerns as to the bases of the Defense experts' opinions about Powell's diagnosis of a Cognitive Disorder.

He noted the following:

(a) There was too much variability in one of the battery of tests Dr. Binks administered, and this should have required Dr. Binks to go back and question other data.

(b) When Powell took the PSAT, before dropping out of school, he scored in the 23rd percentile.

(c) When Dr. Binks administered the six-hour battery of tests, Powell was taking two prescription drugs. These drugs make a person tired and will slow a person down, thus negatively impacting timed tests, memory tests, and concentration tests.

(d) The motor-finger test ignored Powell's self-report of numbness. This test presumes a clear nerve-impulse pattern and the numbness should have been a red flag. This data was then given to Dr. Gur to use in building his analysis; faulty data creates a faulty end opinion.

(e) Dr. Binks "cherry picked" his test results. Dr. Swirsky-Sacchetti found Powell to be impaired only on two of the twenty-two different measures for frontal

lobe and executive function. Powell was average or below average on twenty.

(f) As to Powell's declining IQ, Dr. Swirsky-Sacchetti testified that IQ testing is designed for the age of the person taking the exam. The same test is not administered to all persons of different ages. It is designed for the educational development and intellectual development that would be expected of a person of a specific age. Dr. Swirsky-Sacchetti testified that Powell's conduct and decisions not to be engaged in school (kicked out of all grades at all schools) left him significantly behind in his educational and intellectual growth as compared to his peers. The decline in the IQ test results are because he was falling further and further behind his peers educationally.

He did not associate the IQ decline with oxygen deprivation at birth because nothing suggests that occurred and there were no records to support such an occurrence. While Powell may have been born prematurely, there was nothing to suggest problems. Three days after his birth, he was home. His IQ of 124 at age six completely contradicts the hypothesis of oxygen deprivation. If there had been oxygen deprivation at birth, or *in utero*, the signs would have been obvious to all early on. There were no such signs. He testified there was no such theory that oxygen deprivation at birth would be a "ticking time bomb" that would cause problems later in life.

(g) He respects Dr. Gur as a researcher but that it is what he is doing, i.e., research. He disputes the ventricle analysis of Dr. Gur based upon the radiologist reading of the MRI results, which found no problems. He believes Dr. Gur assumed the radiologist was wrong and did not question the data from his own team.

(h) He is of the opinion that if there was repeated head trauma, it would have been documented in the paper trail of social services and educational records. The single report of head trauma involves Powell's father hitting him.

In the final analysis, Dr. Swirsky-Sacchetti is of the opinion that a Cognitive Disorder does not exist and that any impulsive behavior or inhibition issues are classically related to ADHD.

**Dr. Stephen Mechanick's Testimony**

The State's rebuttal psychiatrist was Dr. Mechanick, who agreed with some of the Defense experts' opinions and disagreed with others.

He agreed with the diagnosis of ADHD, Cannabis Abuse, and Antisocial Personality Disorder.

He disagreed with the diagnosis of Posttraumatic Stress Disorder. He testified this diagnosis requires an extreme traumatic event to precede its onset. He did not agree that the events of Powell's arrest constituted the necessary traumatic event. He was critical of Dr. Alizai-Cowen's sole reliance on Powell's self-reported version of

the events of his arrest. Finally, he noted that there was nothing in the prison records to support this diagnosis. He testified that one would expect something in the prison records establishing that the reported event actually was interfering with Powell's life.

He also disagreed with the diagnosis of Panic Disorder. Again, he is critical of Dr. Alizai-Cowen's conclusions because they are based solely on Powell's self-report. Since Powell is admittedly an unreliable historian,[12] it would be necessary and proper to seek corroboration. Again, there were no complaints in the records to support this diagnosis.

He further disagreed with the diagnosis of Bipolar II Disorder. Again, his criticism is based upon Dr. Alizai-Cowen's reliance based solely on Powell's self-report. He testified that neither the paper trail of Powell's history nor the prison records contain any evidence to support this diagnosis. Dr. Mechanick found some depression but no mania. The events, when Powell was out of control, are not evidence of mania because they all occurred in a situational context - something triggered his explosive reactions. He testified this could not be a basis for such a diagnosis.

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[12]There is no evidence that Powell is psychotic or delusional. There is evidence that, for whatever his purpose or intent, he told the doctors some incredible falsehoods.

He additionally disagreed with the Defense experts' diagnosis of a Cognitive Disorder. The drop in Powell's IQ scores were explained best by recognizing that Powell, with ADHD and a Conduct Disorder, had great difficulty in school and "tuned out" by basically abandoning his own education, which in turn resulted in a reversal of his intellectual development.

He testified that the records do not support any diagnosis based on lack of oxygen at birth. Additionally, reports of Powell being a "blue baby" at birth must be taken in the context that this occurs many times, but newborns "pink up" quickly. Being a "blue baby" does not translate into being an oxygen-deprived child.

Dr. Mechanick testified that what is known is not consistent with oxygen deprivation. Powell was born six weeks premature, but stayed in the hospital only three days. If he was born prematurely and oxygen-deprived at birth, he would not have been released in three days. He concluded that it was a healthy birth. Powell's developmental milestones were normal, contrary to what would be expected if he had been oxygen-deprived. If Powell was brain damaged because of a lack of oxygen, he never would have scored a 124 on his IQ test at age six. It is not possible to have an IQ of 124 at age six and then begin a decline because of what happened to him at birth or prior to birth in regard to oxygen deprivation.

Dr. Mechanick disagreed with the conclusion that a Cognitive Disorder could be attributed to head injuries to Powell. Significant head injuries would have shown up in the reams of records. There would have been something other than Powell's self-reporting. There was only the single father-son fight in the records as to any loss of consciousness. Again, Mr. Powell is not a trustworthy historian.

Dr. Mechanick is a medical doctor. He reviewed the images. He testified that the test results were normal studies.

Noteworthy to Dr. Mechanick is that Powell's executive functions were evidenced in his plan to commit the robbery (one last job to get back home), implementing the plan, the later shooting, flight from the scene at Race and North King Streets, and finally, making up a story to get out of town.

## CONCLUSIONS REGARDING MENTAL HEALTH AND BRAIN DISORDERS

While there were substantial disagreements between the experts, the Court is satisfied that the mental health and/or brain disorder evidence does establish mitigation. The weight given to this mitigator is a different question. One of defendant's alleged mitigators was "the defendant's substantial impairment at the time of the offense as a result of brain damage." The next mitigator alleges the same thing; i.e., "the defendant's diagnosis of Cognitive Disorder, NOS, Severe w/ Global

Deterioration and Further Differential Deficits in Reading, Writing, Attention, Inhibition, Some Executive Skills (Planning) and Fine-Motor Skills." There is nothing to suggest any substantial impairment at the time of the offense as being the cause for, or explanation of, Powell's criminal behavior.

The Antisocial Personality Disorder is a diagnosis that cuts both ways. It is not as much a mental illness as it is a recognition of the individual's personality of being antisocial; i.e., defiant, law-breaking, disrespectful of others, and violent towards people and animals. This evidence cuts both ways.

Finally, it is necessary to comment on the testimony of the experts' opinions that persons diagnosed with Cognitive Disorders and ADHD might be impulsive and/or have a diminished capacity as to appropriately recognizing "fight or flight" circumstances. To the degree Powell has these disorders, it is important to note in these findings of fact that these diagnoses were not a factor in his conduct on September 1, 2009. He knew what he was planning on doing and he did it. Telling Adkins to "give it up" and shooting at him was not an impulsive, uncontrollable act. There was no "fight or flight" misinterpretation by Powell. Adkins made the "fight or flight" decision.

Nor did Powell misinterpret the subsequent events. He did not make a mistake in interpreting what was going on when the police tried to pull them over. Chad

Spicer did not die because of any impulse problems. He died because Powell wanted to avoid arrest and get away. Literally minutes after the shooting, Powell was able to turn on superficial charm and persuade a stranger to let him use her phone and bathroom. Powell's behavior evidences he can be cold-blooded and then use his cognitive function to assist him in his attempt to escape capture.

The bottom line as to all of the brain disorder evidence is that it is not very helpful. The brain disorder testimony did not help in understanding the "why" as to September 1, 2009. There was no direct "cause and effect" opinions offered as to the diagnoses and why a person was killed.

Perhaps in seeking answers, the Court expects too much. The evidence of the disorders of ADHD, Bipolar II Disorder, Panic/Anxiety Disorder, Cannabis Abuse, and Posttraumatic Stress Disorder, neither individually nor cumulatively, establish substantial mitigators. Are they mitigating circumstances? Yes. But they are not weighed heavily. These are disorders or problems that are widespread in our society. It is not my intent to make light of these diagnoses, but they represent ailments or problems with which individuals deal daily.

The Cognitive Disorder diagnosis was hotly contested, with reasonable explanations coming from both sides. I have found the Cognitive Disorder evidence to be a more significant mitigator than the other diagnoses and have given it greater

weight. However, there was no testimony that Powell did not understand and appreciate his chosen life of crime. Regardless of any reasons for the declining IQ test results, any declining IQ did not impact the events of September 1, 2009.

## FINAL DECISION

The defense has argued that a life sentence is the appropriate sentence for Derrick Powell because he is not the "worst of the worst"; i.e., one for whom the death penalty should be considered.

The defense established that Powell grew up in a dysfunctional family and implicitly, he is what he is because his family and society and others failed to do the right things. I do not believe they offer this evidence as an excuse but as a mitigator to explain how Powell came to be the person he is and who he was on September 1, 2009. All of this evidence I deem to be important in the weighing process. But I also note that in determining whether an individual is the "worst of the worst", one must look to the individual's path and journey. I must consider the consequences of Mr. Powell's decisions. As members of a society, we all know that no matter what our decisions may be, there are good and bad consequences.

The sad fact is that too many people are raised in dysfunctional families; and for that reason, but also for other reasons, they may become the "worst of the worst". Most similarly-situated people, although perhaps scarred by having been in a dysfunctional environment, nevertheless hold down jobs, are positively involved with their families, and go about their lives without being devoted to criminal activity.

There is nothing in the evidence to suggest Powell was taught to be a criminal. There is nothing to suggest he was taught to be involved in a drug-selling and gun-carrying world. There is no evidence he was taught to be a robber. The evidence is to the contrary.

The picture of Powell is that he was a self-centered person who defied all authority. He defied his parents, his teachers, the police, and his probation officer. Powell did exactly what Powell wanted to do regardless of the consequences.

Powell may be a relatively young man but at an early age he chose to be a criminal. First, he chose to sell drugs. Then, he found it easier just to rip people off or to rob them. Then he introduced guns into his criminal behavior. He is explosive and violent. His path toward a violent and deadly event was set in motion not by others but by the decisions of Powell. Powell chose to be a career criminal.

Two witnesses in separate criminal episodes reported that Powell stated he either was going to take care of the police in the situation or shoot at the police. Thus, twice before he shot Officer Spicer, he informed others he would take care of the police, implying that he would do whatever needed to be done to any policeman on the scene to allow the crime participants to escape arrest. These statements establish that a policeman seemed destined to become a victim of some crime where Powell was a part of other crimes. This evidence considered with all of the evidence

establish Powell's propensity for violence.

On September 1, 2009, he was in control of the events which resulted in his conviction. He planned a robbery. He shot at Mr. Adkins. He shot and killed a police officer in his attempt to avoid capture.

There are consequences to the decisions made in life. Powell's cumulative decisions brings the Court to this decision. Powell's own decisions as to his criminal lifestyle, disregard of others and use of firearms weigh heavily in aggravation.

After weighing all relevant evidence and the jury recommendation, the Court finds by a preponderance of the evidence in aggravation or mitigation, which bears upon the particular circumstances or details of the commission of the murder and the character of Powell, that the aggravating circumstances outweigh the mitigating circumstances the Court has found to exist. The sentence is death.